

No. 3459.

IN THE

3

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Harry Dean,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ROBERT O'CONNOR,

United States Attorney,

GORDON LAWSON,

Assistant United States Attorney.

No. 3459.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Harry Dean,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ARGUMENT.

On page 5 of his brief, plaintiff in error states the only point raised, as follows:

“That the court erred in rendering its judgment against the plaintiff in error upon Count One of the indictment in this cause, for the reason that the said Count One of the indictment in said cause does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America, or the violation of any law or statute of the United States of America, whatsoever or at all.”

The indictment in question charges a violation of section one of the Harrison Narcotic Act, as amended by an Act of Congress approved February 24, 1919, Volume 40, U. S. Statutes at Large, chapter 18, page 1057, entitled "An act to provide revenue and for other purposes." At page 1131, that part of the act descriptive of this offense is as follows:

"It shall be unlawful for any person to purchase, sell, dispense or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of the violation of this section by the person in whose possession same may be found."

The indictment in the case at bar charges the plaintiff in error in the first count as follows:

"Did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute cocaine in and from a certain tin box, which said tin box was not then and there the original stamped package containing the said cocaine." [Transcript of Record, page 6.]

By a comparison of the statute and the language in the indictment, it is clear that in the latter the exact statutory language was used.

It is, of course, unnecessary before this Honorable Court to cite authorities in support of the proposition that, where the offense is statutory, an indictment is sufficient in its allegations if it follows the statutory language. However, in addition to the use of the

statutory language, the indictment furnished to the plaintiff in error a more particular description of the evidence he would have to meet. The first count continues:

“The said defendant did at the time and place aforesaid have in his possession at the corner of Figueroa street and Sunset boulevard, in the said city of Los Angeles, county of Los Angeles, the said tin box then and there containing the said cocaine, which said cocaine was then and there a compound, manufacture, salt, derivative and preparation of cocoa leaves, and the said cocaine contained in the said tin box then and there consisted of about one-half of an ounce; and the said tin box then and there containing the said cocaine did not then and there bear and have affixed thereon appropriate tax paid stamps, as required in an Act of Congress approved December 17, 1914, known as the Harrison Narcotic Law, etc.” [Transcript of Record, page 6.]

We agree with plaintiff in error that the gist of the offense is the purchasing, distributing, dispensing and selling of narcotics. (His brief, page 5.) The act, however, provides that in proof of that violation a *prima facie* case may be made by showing the possession of any of the forbidden narcotics without having affixed thereto appropriate tax paid stamps. (40 Statutes at Large, page 1131, *supra*.)

This indictment might be subject to the criticism that an attempt was made to furnish to the plaintiff in error too detailed a description of the offense with which he was charged, but it is certainly not open to

the charge that the allegations are insufficient, which the plaintiff in error here raises for the first time.

Plaintiff in error has cited no authority for his position. On page 11 of his brief he cites three cases to the effect that under the Harrison Narcotic Act prior to the amendment approved February 24th, 1919, that that part of section eight of the old act was held unconstitutional in so far as it related to the mere possession by one who was not required to register as a dealer and pay a special tax. It has been consistently held that Federal courts have no jurisdiction unless a Federal tax was involved, and that it was an usurpation of state police power to punish for mere possession where no tax was involved. It is submitted that the very purpose of section one of the amended act of February 24th, 1919, *supra*, was to extend the jurisdiction of the United States courts to the offenses which the above decisions have restricted them. This was done by making it not an offense to have possession, but to make possession *prima facie* proof of purchasing, selling and distributing in and from packages not bearing the appropriate tax paid stamps.

It is submitted that the indictment in this case was sufficient.

Respectfully,

ROBERT O'CONNOR,

United States Attorney,

GORDON LAWSON,

Assistant United States Attorney.